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No. 96-563

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, and CROUNSE CORPORATION,
Petitioners,

v.

JAMES H. PAIGE III,
State Tax Commissioner of West Virginia,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state tax dedicated exclusively for state highways that is imposed on fuel consumed by vessels traveling along interstate navigable waterways violates the Duty of Tonnage, Commerce and Supremacy Clauses of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF THE *AMICUS CURIAE*	1
ARGUMENT	2
I. THE QUESTIONS PRESENTED IN THE PETITION ARE OF GREAT IMPORTANCE TO THE MINING INDUSTRY OF THE UNITED STATES	2
II. THE DECISION BELOW CONFLICTS DIRECTLY WITH CONSTITUTIONAL PRINCIPLES THAT RESTRAIN STATE TAXATION	4
The Duty of Tonnage Clause	4
The Commerce Clause	5
The Supremacy Clause	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7 (1983) 8
American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 (1987) 6
Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 4, 5
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 6
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 6
Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 7
Helson v. Kentucky, 279 U.S. 245 (1929) 5
Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355 (1994) 6
Southern S.S. Co. of New Orleans v. Portwardens, 73 U.S. 31 (1867) 4
State Tonnage Tax Cases, 79 U.S. 204 (1870) 4
United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) 5
United States v. Cress, 243 U.S. 316 (1917) 7
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 8

Constitution of the United States:

U.S. Const., art. I, § 8, cl. 3 ..... *passim*
U.S. Const., art. I, § 10, cl. 3 ..... *passim*
U.S. Const., art. VI, cl. 2 ..... *passim*

Statutes:

Inland Waterways Revenue Act of 1978 (currently at 26 U.S.C. § 4042) 8
Rivers and Harbors Appropriation Act of 1884 (currently at 33 U.S.C. § 5) 7

United States Code:

26 U.S.C. § 4042 ..... 7, 8
26 U.S.C. § 9506 ..... 7, 8
33 U.S.C. § 5 ..... 7, 8
33 U.S.C. § 1 ..... 7, 8

TABLE OF AUTHORITIES—Continued

	Page
West Virginia Code:	
W. Va. Code § 11-15-18(c) (6) (1996)	4
W. Va. Code § 11-15A-13(a) (2) (1996)	4
W. Va. Code § 11-15A-13(g) (1996)	4
Federal Regulation:	
33 C.F.R. Pt. 207	8
Miscellaneous:	
H.R. Rep. No. 545, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code, Cong. & Admin. News 3716	9

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INTERESTS OF THE *AMICUS CURIAE*

The 25,000 miles of navigable inland waterways provide the Nation with an important path for the free flow of commerce. The historic and contemporary importance of waterborne commerce in this Nation rests upon the constitutional policy of access that is free from state exactions imposed for the navigation of these waters. The present case involves a state fuel use tax that contravenes this constitutional policy and almost 200 years of supporting jurisprudence. For those who conduct, or rely upon, waterborne commerce, this case raises the prospect that states and local governments bordering navigable inland waterways will now feel free to impose similar charges for the right of passage.

Amicus, the National Mining Association, is a trade association representing mining companies that produce most of the Nation's minerals.[1] Its members also include other key segments of the mining industry—manufacturers of equipment, resource developers, and transporters of the products of mining.

The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. Coal is used to generate 56% of the electricity consumed on an annual basis in the United States. Mining companies produced $39 billion worth of nonfuel minerals last year, which in turn were used to manufacture $395 billion worth of products for use by Americans and for export to trading partners around the world.

The principal purpose of Amicus is to represent those with interests in the Nation's mineral resources industries in the important public policy issues affecting the development and use of mineral resources. Toward this end, Amicus seeks to develop policies that will foster the efficient production, distribution and use of mineral products.

ARGUMENT

I. THE QUESTIONS PRESENTED IN THE PETITION ARE OF GREAT IMPORTANCE TO THE MINING INDUSTRY OF THE UNITED STATES

Because of these stated interests, the present case is of great importance to Amicus. There is a high degree of interdependence among the Nation's mining industry, its customers, and those who transport mineral products in interstate commerce. The costs of transportation is a substantial factor in the delivered price of mineral products. For example, transportation costs on average na-

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[1] Pursuant to Supreme Court Rule 37.2, the parties to this case have by letters consented to the filing of this brief. Copies of these letters of consent have been filed with the Clerk of this Court.

tionally comprise about 30% of the delivered price of coal to electric utilities, and can account for as much as 50% of the delivered price to some regions.

Almost 280 million tons of mineral products are transported by barge through navigable inland waterways, about half of all commodity barge traffic on these waterways. Where accessible, water transportation can be the most economical mode for transporting mineral products. The cost of water transportation can be half that of other transportation modes since barges are twice as fuel efficient as railroads. The availability of alternative modes of transportation (*e.g.*, rail, barge, truck) also fosters competition to assure reasonable transportation rates for both the producers and consumers of mineral products.

Although this case involves a West Virginia tax, it nonetheless has important national implications. The Supreme Court of Appeals of West Virginia clearly departed from almost 200 years of jurisprudence under the Duty of Tonnage, Commerce and Supremacy Clauses of the United States Constitution that prohibits such state exactions upon interstate commerce. Inasmuch as mineral products comprise almost half of all commodity barge traffic on navigable inland waterways, the decision below poses a substantial threat to the economic viability of Amicus' enterprises which depend upon the national policy that protects their access to navigable waterways from state levies imposed upon the mere use of these pathways of commerce.

As it stands, the decision below signals the numerous states and local governments geographically located on navigable inland waterways that Amicus' commerce is now a fertile source of tax revenue for merely passing through these waters. These barriers not only burden the mining industry with higher costs, but also impede the use of the most efficient modes and paths for moving its products in interstate commerce.

II. THE DECISION BELOW CONFLICTS DIRECTLY WITH CONSTITUTIONAL PRINCIPLES THAT RESTRAIN STATE TAXATION

The West Virginia fuel use tax is imposed upon gasoline, diesel and other fuels purchased outside the state but used or consumed in the state by motor carriers, including barges and other watercraft. W. Va. Code § 11-15A-13(a)(2), § 11-15-18(c)(6) (1996). The taxes collected may be used only for purposes related to state highways. W. Va. Code § 11-15A-13(g) (1996). The decision below upholding the imposition of the fuel use tax on waterborne commerce on the Ohio River undermines the long recognized restraints on state taxation under the Duty of Tonnage, Commerce and Supremacy Clauses of the United States Constitution.

The Duty of Tonnage Clause

The Duty of Tonnage Clause (art. I, § 10, cl. 3) prohibits state charges or duties imposed without the consent of Congress for the privilege of entering, trading in, or lying in port, harbor or waterway. To be sure, this proscription does not extend to state assessments that reflect reasonable compensation for services provided to a vessel. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). However, in the absence of some direct relationship between the charge and services provided by the state, a state exaction on tonnage, or some proxy (*i.e.*, fuel consumption), violates the clear prohibition of the Duty of Tonnage Clause. *See State Tonnage Tax Cases*, 79 U.S. 204, 214 (1870); *Southern S.S. Co. of New Orleans v. Portwardens*, 73 U.S. 31, 35 (1867).

The West Virginia fuel use tax here does not embody any "quid pro quo" for which the State may demand compensation from those who navigate the Ohio River. The means of navigation that is subject to the fuel tax here enjoys no services or facilities related to their passage on the Ohio River. The revenue derived from the West Vir-

ginia tax is dedicated exclusively to purposes that benefit another mode of transportation—the state highways. Nor does the fact that the tax falls upon a necessity of voyage, *i.e.*, fuel consumption, instead of the vessels themselves, provide any sanctuary from the constitutional prohibition against state levies for access to navigable waterways. *Clyde Mallory Lines*, 296 U.S. at 265-66 (prohibition embraces all taxes that impose a charge for privilege of entry or trade regardless of their form or measurement). The effect remains the same as a levy on the vessel itself. The vessels either pay the tax or cease their use of this important pathway of interstate commerce.

The constitutional immunity from state taxation the Duty of Tonnage Clause provides waterborne commerce does not dissolve because the same assessment is levied upon other carriers. Nothing in the text of the Clause or its supporting jurisprudence suggests that the permissible portion of a state levy saves any part that offends the express prohibition. To accept the contrary view, as did the court below, would allow the States to perpetuate the same evils the Duty of Tonnage Clause was intended to eliminate by also imposing the tax on those who do not fall within the ambit of the Clause's protection.

The Commerce Clause

A state fuel consumpion tax that in effect exacts a toll or fee for the mere access to interstate navigable waterways cannot be sustained under the Commerce Clause when the exaction bears no relation to services provided by the state to the interstate activity.[2] Although the priv-

[2] State fuel consumption taxes remian particularly suspect in their capability to create the evils forbidden by the Commerce Clause since they often are "exacted as the price of the privilege of using an instrumentality of interstate commerce." *Helson v. Commonwealth of Kentucky*, 279 U.S. 245, 252 (1929). *See also United Airlines v. Mahin*, 410 U.S. 623, 630 (1973) (noting that the distinction between an impermissible tax on mere consumption of fuel in *Helson* and a permissible tax on fuel storage continues to serve rational purposes).

ileged status of interstate commerce has diminished under the current Commerce Clause jurisprudence, the state tax burden it may now fairly share is just that—a fair share in relation "to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

The West Virginia fuel consumption tax is dedicated exclusively to the construction and maintenance of state highways. The tax is not related to any services West Virginia provides to vessels plying the Ohio River. In fact, the tax pays for benefits enjoyed exclusively by a competing mode of transportation. While interstate commerce may be required to pay its fair share or its own way, this Court has never suggested, as did the state court, that it may be required to pay more than its fair share or, for that matter, pay for someone else's way.

The state court below employed an incorrect and troubling analysis that tests "user" fees or taxes by the same standard as a general revenue tax. *See Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 621-22 (1977) (noting the distinct standards for testing specific state levies imposed for the use of state services or facilities and taxes that provide for the general support of the government). The state court below ignored this important distinction. Instead, the court considered the vessels' nexus with West Virginia sufficient alone to justify the lack of a direct relationship to the service provided by the state tax. Pet. App. 22a.

Amicus submits that the forth prong of *Complete Auto* still requires for "user" taxes a closer fit, or approximation, between the state tax and the use of state services or facilities. *See, e.g., Northwest Airlines, Inc. v. County of Kent, Michigan,* 510 U.S. 355, 369 (1994); *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 289-91 (1987). If the broader latitude afforded the States for general revenue taxes applies also to specific state exactions that exploit their geographical location, then the

negative command of the Commerce Clause poses little, if any, restraint upon a taxing jurisdiction's monopoly position over these important highways of commerce.

The Supremacy Clause

The historical importance of navigable inland waterways as a national highway for commerce has been accompanied by the pervasive presence of the Federal Government in matters related to these waterways. This presence manifests itself through federal laws that address the operation of these waterways as well as the regulation and taxation of commercial traffic.[3] Congress has demonstated an unmistakable intent to displace competing state exactions on commercial traffic using these waterways through both an explicit prohibition and a comprehensive federal scheme that simply leaves no room for state supplementation.

More than 100 years ago, Congress enacted in the Rivers and Harbors Appropriation Act of 1884 (Act of July 5, 1884, c. 229, § 4, 23 Stat. 147), a proscription on the type of levy at issue here. As currently codified, the federal law expressly prohibits the levy of any "tolls or operating charges whatever" upon vessels passing through locks, canals or canalized rivers. 33 U.S.C. § 5.[4] Here, the unambiguous language of the federal statute is dispositive as to Congress' intent. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986) (no need to go further than the statutory language to find express pre-emption if the plain language precludes certain state

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[3] *See, e.g.*, 33 U.S.C. § 1, *et seq.* (Navigation and Navigable Waterways); 26 U.S.C. § 4042 (Tax on fuel used on inland waterways); 26 U.S.C. § 9506 (Inland Waterways Trust Fund); 46 U.S.C. § 1, *et seq.* (Shipping).

[4] The Ohio River became a "canalized river" through the U.S. Army Corp of Engineers' construction of locks and dams for the "use and benefit of navigation." *See United States v. Cress*, 243 U.S. 316, 326 (1917).

legislation). By its own terms, the federal statute expressly precludes the imposition of a state use tax or charge upon a vessel for passage through a canalized river.

The unambiguous proscription in 33 U.S.C. § 5 is not avoided because the West Virginia levy takes its form as an exaction on fuel consumption. *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 464 U.S. 7, 13-14 (1983) (style or description of state tax cannot mask the effect that imposes a levy expressly prohibited by federal statute). Here, the West Virginia use tax is levied by virtue of the operation of a vessel through the Ohio River, and the charge is measured by the use of a necessity of the passage—fuel consumption. The effect is the levy of an operating charge 33 U.S.C. § 5 forbids for a vessel passing through the Ohio River.

Even if there were no express congressional statement like 33 U.S.C. § 5 prohibiting the state levy, the Federal Government's interest in navigable waterways is so dominant that no room remains for a state exaction placed upon its navigation. *See White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 150-51 (1980). The pervasive federal presence in this area takes various forms including numerous Acts of Congress and regulations that address the use, administration and navigation of these waterways.[5] Moreover, federal law imposes a fuel use tax on the same commercial traffic at issue here. The Federal tax enacted as part of the Inland Waterways Revenue Act of 1978 is levied upon fuel consumed by vessels used in commercial traffic on the inland and intracoastal waterways. 26 U.S.C. § 4042. The revenue collected is dedicated to fund the construction and rehabilitation of the Nation's inland and intracoastal waterway transportation system. 26 U.S.C. § 9506.[6]

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[5] *E.g.*, 33 U.S.C. § 1, *et seq.*; 33 C.F.R. Pt. 207 (1995).

[6] The Inland Waterways Revenue Act of 1978 shifted the cost of the expansion and maintenance of the waterways system from tax-

Despite this comprehensive federal scheme, the court below declined to find the West Virginia fuel use tax pre-empted in the absence of an outright conflict between these concurrent taxing regimes. Pet. App. 14a. However, this is only one aspect, or variety, of the pre-emption doctrine. When, as here, the competing state levy undermines the objective of the federal scheme for financing the expansion and operation of the Federally-built-and-maintained waterway system, there is no room for the additional burden the state fuel use tax imposes upon the same commercial traffic. This is not a case where the State seeks to assess a tax that compensates for any services or facilities it provides commercial traffic on the Federal waterway system. The State's interest here in supporting its own highways is insufficient to allow this intrusion upon the Federal policy for financing the Nation's inland waterway system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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payers in general to the direct users of the system. *See* H.R. Rep. No. 545, 95th Cong., 2d Sess. 40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3716, 3722.